

LEXSEE 1998 US Dist Lexis 10518

**MARTIN GARDNER REIFFIN, Plaintiff, v. MICROSOFT CORPORATION,
Defendant.**

No. C-98-0266-VRW

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

1998 U.S. Dist. LEXIS 10518; 48 U.S.P.Q.2D (BNA) 1274

July 10, 1998, Decided

July 10, 1998, Filed

DISPOSITION:

[*1] Microsoft's motion (Doc # 50, Pt # 1) to strike or reschedule Reiffin's counter motion for summary judgment DENIED; Microsoft's motion (Doc # 21, Pt # 1) for summary judgment GRANTED and Reiffin's counter motion (Doc # 31, Pt # 1) for summary judgment DENIED. Judgment entered in favor of defendant and against plaintiff.

CORE TERMS: patent, invention, counter, summary judgment, written description, disclosure, console, sofa, invalid, original motion, subject matter, embodiment, omit, asserting, compiler, inventor, clear and convincing evidence, essential element, lockout, multi-threading, reschedule, untimely, skilled, editor, patent act, invalidity, competitor, reclining, quotation, cartridge

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MARTIN GARDNER REIFFIN, Counter-defendant, Pro se, Danville, CA.

JUDGES:

VAUGHN R. WALKER, United States District Judge.

OPINIONBY:

VAUGHN R. WALKER

OPINION:

ORDER.

Plaintiff Martin Gardner Reiffin brings this action claiming patent infringement against defendant Microsoft Corporation. [*2] Reiffin claims that he owns a patent on a form of computer technology called multi-threading. In essence, computers with multi-threading capabilities can switch between tasks with such rapidity that they appear to be performing two or more tasks at once. For example, a computer with multi-threading capabilities can run a word processing program that appears to be receiving data (i.e., words) at the same time it is spell-checking those words. In actuality, the computer's processor (CPU) is switching from one task to the other by quickly processing keystroke threads, then spell-check threads, then keystroke threads and so on.

Reiffin claims that several of Microsoft's software applications make unlawful use of his patented multi-threading technology. Reiffin has moved for a temporary

restraining order and a preliminary injunction enjoining Microsoft from distributing Windows 98 and other products that allegedly infringe Reiffin's patents.

Currently pending before the court is Microsoft's motion for summary judgment that Reiffin's patents are invalid because they fail one specific aspect of the written description requirement contained in section 112 of the patent act. See 35 USC § [*3] 112. Also pending before the court is Reiffin's counter motion for summary judgment that his patents are not invalid. Through these cross motions, Microsoft and Reiffin both contend that there are no material issues of fact with regard to the invalidity of Reiffin's patents.

I

Before considering the merits of the competing motions for summary judgment, the court must determine whether Reiffin's counter motion is properly before the court. On March 26, 1998, Microsoft moved for summary judgment that Reiffin's patents are invalid under the written description requirement. Specifically, Microsoft argues that the claims Reiffin is currently asserting lack elements that were essential to his invention as originally disclosed. On April 15, Reiffin filed a written opposition to Microsoft's motion, and he also filed a counter motion for summary judgment that his patents are not invalid under the written description requirement.

Microsoft has moved the court to strike or reschedule Reiffin's counter motion. Microsoft argues that Reiffin's relatively broad counter motion dealing with the entire written description requirement goes beyond the scope of Microsoft's original and more narrow [*4] motion addressing only the omitted element test. Microsoft claims that the local rules of court do not permit Reiffin's counter motion because it does not address the same subject matter as Microsoft's original motion.

To further the interests of efficiency and judicial economy, Civil LR 7-3(c) allows a party opposing a motion to file a counter motion so long as the counter motion is related to the same subject matter as the original motion. n1 Under this rule, the party that filed the original motion must incorporate its opposition to the counter motion into the reply memorandum for its original motion. Unless the court orders otherwise, the party opposing the counter motion does not have the opportunity to file a separate opposition memorandum. See Civil LR 7-3(c).

n1 Civil LR 7-3(c) states: "Counter Motion. Together with an opposition, a party responding to a motion may file a counter-motion related to

the subject matter of the original motion. Such counter-motion shall be noticed for hearing on the same date as the original motion, but shall otherwise comply with Civil L.R. 7-2."

[*5]

In the matter at bar, Microsoft claims that Reiffin's counter motion is improper because it does not address the same subject matter as Microsoft's original motion. Specifically, Microsoft argues that its original motion addresses a single, limited aspect of the written description requirement whereas Reiffin's counter motion goes beyond this subject matter and seeks summary judgment with regard to the entire written description requirement. Reiffin, on the other hand, argues that his counter motion is appropriate because it relates to the same subject matter as Microsoft's motion -- the written description requirement.

Obviously, the issue before the court is how broadly it should read Civil LR 7-3(c) and, in particular, the phrase "related to the subject matter of the original motion." Before turning to this question, it may be helpful to summarize the patent law at issue. Section 112 of the patent act imposes several requirements on the specifications within a patent. One of those requirements is the written description requirement. See 35 USC § 112. This written description requirement contains at least three separate sub-requirements -- the adequate description requirement, [*6] the new matter prohibition and the omitted element prohibition. n2

n2 The court will discuss the nature of the omitted element prohibition or test in greater detail below.

Given that section 112 basically has three levels of specificity, there are three possible ways in which the court could resolve this issue. First, the court could take a broad approach and assume that all issues concerning the application of section 112 are related to the same subject matter for purposes of Civil LR 7-3(c). Under such an approach, Reiffin's counter motion would clearly be permissible. Nonetheless, such an approach is too broad. Section 112 contains numerous specific requirements. Several of these requirements may be relevant to the same lawsuit. Courts would likely benefit from a full discussion of each of these various issues. It would therefore be unwise to employ a rule which may force the parties to condense all of their arguments on the many requirements of this broad section into one motion and counter motion for summary [*7] judgment.

Second, the court could adopt a narrow approach and conclude that Reiffin's counter motion is inappropriate because it goes beyond the precise subject matter of Microsoft's original motion. In other words, since Microsoft's motion only addresses one specific aspect of the written description requirement (namely, the omitted element test), the court could preclude Reiffin from filing a counter motion that went beyond this limited topic. This approach is too narrow. The purpose of the counter motion rule is to allow the parties and the court to resolve broad issues at once, if possible. The patent act contains numerous requirements. It would be inefficient to allow defendants to bring motions for summary judgment on each minute requirement while plaintiffs were precluded from bringing counter motions on closely related but slightly broader issues.

Third, the court could take the middle ground and conclude that all motions related to the written description requirement contained in section 112 are related to the same subject matter for purposes of Civil LR 7-3(c). This is what the court will do. The court therefore concludes that Reiffin's counter motion for summary judgment [*8] is properly before the court. Of course, the court does not mean to imply that it will grant Reiffin's counter motion for summary judgment simply because that motion is procedurally appropriate. Furthermore, because of the confusion surrounding this issue, the court will exercise its authority under Civil LR 7-3(c) and 7-8 to consider Microsoft's otherwise untimely opposition to the counter motion as well as Reiffin's untimely memorandum styled as a surreply.

For the foregoing reasons, the court will deny Microsoft's motion to strike or reschedule Reiffin's counter motion for summary judgment that his patents are not invalid.

II

With this procedural matter resolved, the court will now turn to the merits of Microsoft's motion for summary judgment. In essence, Microsoft argues that Reiffin's patents are invalid because the claims in his patents as issued in 1997 omit elements that were essential to Reiffin's invention as disclosed in his 1982 application. To determine whether Microsoft is entitled to summary judgment, the court will have to answer two questions.

The first question is whether the written description requirement contains an omitted element test. It is well established [*9] that section 112 requires that a patent contain a description of the invention that is sufficient to enable someone skilled in the art to recognize what has been invented. See *id.* It is also well established that section 112 prevents a patent owner from asserting claims that are beyond the scope of the original patent.

See *id.* Microsoft contends that section 112 also prevents a patent owner from asserting claims that omit essential elements of the invention as originally disclosed in the patent application. Reiffin, on the other hand, contends that there is no such limitation. The court must therefore determine whether there is an omitted element test within the written description requirement of section 112.

The second question is factual. Assuming there is an omitted element test within the written description requirement, the court must determine whether Microsoft has demonstrated by clear and convincing evidence that Reiffin's current claims omit certain elements that were essential to his invention as disclosed in his 1982 application. Microsoft claims that Reiffin's initial application disclosed four elements that were essential to his invention (an editor, a compiler, an interrupt [*10] means and a return means). Microsoft argues that Reiffin's current claims under the patents as issued make no reference to these elements. The court must therefore determine whether Microsoft has demonstrated by clear and convincing evidence that a person skilled in the art would have understood these four elements to be essential to Reiffin's invention as disclosed in 1982.

A

With regard to the first question, it is fairly well established that a patent owner may assert claims which go beyond the specific embodiment shown in his application. See *Ethicon Endo-Surgery, Inc v. United States Surgical Corp*, 93 F.3d 1572, 1582 n.7 (Fed Cir 1996). The classic example of the Ethicon principle involves a patent on a barn. Even if the patent owner's application contained a preferred embodiment that depicted only a red barn, the patent owner would not necessarily be foreclosed from asserting a claim over a brown barn.

Microsoft contends that despite the Ethicon rule, there is an omitted element test within the written description requirement. Microsoft bases this argument almost entirely on the Federal Circuit's recent holding in *Gentry Gallery, Inc v. Berkline Corp*, 134 F.3d 1473, [*11] 1479-80 (Fed Cir 1998). n3

n3 The Federal Circuit has declined to rehear this case in banc. The Supreme Court has neither granted nor denied certiorari in this case.

In *Gentry Gallery*, a patent owner brought suit against a competitor in the field of sofa design. The plaintiff, *Gentry*, owned a patent on a sectional sofa containing two parallel reclining seats separated by a fixed console. The original disclosure of the invention in

the patent application stated that the console contained the controls for both reclining seats; the original disclosure did not suggest any alternative location for the controls. See *id* at 1479. Nonetheless, Gentry attempted to assert subsequently added claims covering sofas in which the controls were not on the console.

The Federal Circuit acknowledged the rule announced in *Ethicon* and noted that a patent holder is not necessarily limited to the one embodiment of an invention described in the application. Nonetheless, the Gentry court ruled that a patent owner's original [*12] disclosure does limit the scope of permissible claims. Specifically, the court held that a patent owner cannot assert claims that omit elements of the invention as originally disclosed if a person skilled in the art would have understood those elements to be essential to the disclosed invention. See *id* at 1480. Applying this holding, the Gentry court held invalid Gentry's claims for sofas in which the controls were not located on the console because the patent application's original disclosure, the original claims and additional evidence demonstrated that placement of the controls on the console was an essential element of the sofa as originally disclosed in the application. See *id* at 1479-80. In general terms, therefore, Gentry held that patent claims are invalid under section 112 if they omit an element that someone skilled in the art would understand to be essential to the invention as originally disclosed. See *id* at 1480.

Although the holding in Gentry is certainly notable, it is not unprecedented. In *Ethicon*, for example, the Federal Circuit reviewed a patent on a medical stapler. In the patent application, the inventor provided a preferred embodiment in which [*13] the lockout mechanism was mounted to the stapler's cartridge. The court held that the preferred embodiment alone did not necessarily limit the scope of the patent to staplers in which the lockout mechanism was on the cartridge. The *Ethicon* court noted, however, that it reached this decision because at the time of the application, the inventor did not consider the placement of the lockout mechanism on the cartridge to be an "element" of his invention. *Ethicon*, 93 F.3d at 1582 n.7. The obvious converse inference from this ruling was that if the inventor or someone skilled in the art would have considered the location of the lockout mechanism to be an element of the invention, then the patent owner could not have asserted claims that omitted this element.

In addition, older case law also supports an application of an omitted element test. For example, in *US Industrial Chemicals, Inc. v. Carbide & Carbon Chemicals Corp.*, 315 U.S. 668, 677-78, 86 L. Ed. 1105, 62 S. Ct. 839 (1942), the Supreme Court stated that it has "uniformly held that the omission from a reissue patent

of one of the steps or elements prescribed in the original, thus broadening the claims to cover a new and different [*14] combination, renders the reissue void." Similarly, in *In re Sus*, 49 C.C.P.A. 1301, 306 F.2d 494, 505 (CCPA 1962), the predecessor to the Federal Circuit held that it "is well settled that claims in an application which are broader than the applicant's disclosure are not allowable."

Perhaps fearing the results of an application of the omitted element test to his patents, Reiffin has attempted in both his written and oral arguments to convince the court that there is no such test under Gentry or other Federal Circuit precedent. Reiffin's arguments, however, amount to little more than a reiteration of the *Ethicon* standard. Microsoft does not dispute the fact that under *Ethicon* a patent is not necessarily limited by the preferred embodiment in the patent application. Nonetheless, under the omitted element test set forth in Gentry, a court can limit the claims of a patent on the basis of the disclosure in the application. Indeed, the Gentry court specifically distinguished *Ethicon* and rejected an argument that was almost identical to the one Reiffin is advancing. See *Gentry*, 134 F.3d at 1479.

In another effort to dissuade the court from applying the omitted [*15] element test set forth in Gentry, Reiffin has mischaracterized the nature of this test. Reiffin argues that the court cannot look to his original 1982 disclosure to determine the nature and elements of his invention. Instead, Reiffin contends that the claims in the patents as issued in 1997 define the invention and therefore which of his claims are invalid. This argument fails at two levels.

First, the application of Reiffin's arguments would necessarily eviscerate the omitted element test set forth in Gentry. This test prevents a patent owner from asserting claims that omit elements that were essential to the invention *as originally disclosed*. If courts were to define the invention by the issued claims, this test would be a dead letter. Obviously, issued claims will never go beyond the scope of the invention if the invention is defined by the issued claims. As the Gentry court made perfectly clear, the omitted element test does not circularly define the invention in accordance with the issued claims; instead, it focuses on the invention as originally disclosed in the patent application. See *Gentry*, 134 F.3d at 1480.

Second, and not surprisingly, the authority [*16] Reiffin has cited provides no foundation for his position. In support of his contention that the issued claims define the invention for purposes of the current inquiry, Reiffin quotes a single line from a Federal Circuit opinion. See Opp Mem at 15 (quoting *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1564 (Fed Cir 1991)) ("the invention is, for

purposes of the 'written description' inquiry, whatever is now claimed.") Whether Reiffin is attempting to deceive the court through selective quotation or whether he is simply mistaken, this quotation (once viewed in context) does not help Reiffin's cause. In determining whether a patent owner's claim went beyond the invention disclosed in the application, the Vas-Cath court ruled that:

The purpose of the 'written description' requirement is broader than to merely explain how to 'make and use'; the applicant must also convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. The invention is, for purposes of the 'written description' inquiry, whatever is now claimed.

Id. at 1563-64. Viewing this quotation in context, it becomes clear that the [*17] Vas-Cath court did not hold that the issued claims define the invention for purposes of the omitted element test. Instead, the court held that the written description rule requires that the initial disclosure must have revealed that the patent applicant was in possession of the invention before the patent owner can subsequently obtain protection for that invention. In other words, the relevant question is whether the invention disclosed in the patent application is the same as the "invention *** now claimed." See *id.*; see also *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1571-72 (Fed Cir 1997) ("it is the disclosures of the applications that count.")

This is exactly the question that the court is asking in the case at bar. To answer this question, the court will determine whether Reiffin's 1982 application disclosed the invention for which he is now asserting ownership. Under Gentry, Reiffin is not entitled to such ownership if his currently asserted claims omit elements that were essential to his invention as it was originally disclosed.

Finally, Reiffin's reliance on *Kingsdown Medical Consultants Ltd v. Hollister, Inc.*, 863 F.2d 867, 9 U.S.P.Q.2D (BNA) 1384, 1390 (Fed [*18] Cir 1987), is also misplaced. In response to Microsoft's charges that Reiffin has strategically amended his claims in order to benefit from the inventions of others via a "submarine patent," Reiffin claims that there is nothing unlawful about such a strategy. To support this argument, Reiffin selectively quotes the following language from *Kingsdown* to the court:

It should be made clear at the outset of the present discussion that there is nothing improper, illegal or inequitable in filing a patent application for the purpose of obtaining a right to exclude a known competitor's

product from the market; nor is it in any manner improper to amend or insert claims intended to cover a competitor's product [that] the applicant's attorney has learned about during the prosecution of a patent application.

Reiffin Opp Mem at 15 (quoting *Kingsdown*, 9 U.S.P.Q.2D (BNA) at 1390). In the very next sentence of the *Kingsdown* opinion, however, the Federal Circuit cautioned that "any such amendment or insertion must comply with all statutes and regulations, of course." *Kingsdown*, 9 U.S.P.Q.2D (BNA) at 1390. As Reiffin is undoubtedly aware, section 112 (and its written description requirement) [*19] is one such statute. Reiffin may be correct in his assertion that his motives are irrelevant. Nonetheless, it is clear to the court that Gentry either establishes, or more likely reiterates and clarifies, the omitted element test. Reiffin's motives aside, it is entirely appropriate for the court to apply this test and determine whether Reiffin's patents run afoul of the written description requirement.

B

Having concluded that there is an omitted element test within the written description requirement, the court must now apply that test to the facts of the case. Specifically, for Microsoft to prevail on its motion for summary judgment, it must demonstrate that certain elements that were initially essential to Reiffin's originally disclosed invention have since been omitted.

1

Summary judgment is available in patent cases as in other areas of litigation. *Nike Inc v. Wolverine World Wide, Inc.*, 43 F.3d 644, 646 (Fed Cir 1994). Summary judgment is properly granted when there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565, [*20] 1571 (Fed Cir 1991). In the current action, both parties contend that there are no genuine issues of material fact with relation to the invalidity of Reiffin's patents. Both parties suggested at oral argument that the court need not look beyond the patent documents to resolve the pending motions for summary judgment. The contents of these documents are not in dispute.

Because there is a presumption that patent examiners have done their jobs correctly, courts presume that patents are valid. See *Brooktree Corp v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 24 U.S.P.Q.2D (BNA) 1401, 1414 (Fed Cir 1992). As such, when a party seeks summary judgment that a patent is invalid, that party must establish invalidity by clear and convincing evidence. See *Electro Med Sys S.A. v. Cooper Life*

Sciences, 34 F.3d 1048, 1052 (Fed Cir 1994). As such, in the case at bar the, Microsoft must prove by clear and convincing evidence that the one of the elements present in Reiffin's original disclosure but omitted from the issued patent claims was essential to Reiffin's original invention.

2

Microsoft contends that Reiffin's 1982 application disclosed four elements that were essential to his invention. In particular, [*21] Microsoft claims that Reiffin's original disclosure included an editor, a compiler, an interrupt means and a return means. It is now undisputed that these elements are missing from each of Reiffin's 77 currently asserted claims. What is at issue is whether these four omitted elements were essential to Reiffin's invention as originally disclosed.

In Gentry, the court faced a similar question when it had to determine whether the location of the controls on the console was an essential element of the sofa as disclosed. To resolve this issue, the Federal Circuit looked first and primarily to the disclosure of the invention contained in the patent application. See *Gentry*, 134 F.3d at 1479. This court will do the same. Reiffin's initial disclosure and indeed several sections of his application reveal that the four subsequently omitted elements were in fact essential to Reiffin's invention as originally disclosed. See McMahon Decl at Ex D.

The section of Reiffin's application entitled "Summary of the Invention" makes reference to all four elements. See id at 5-8. Similarly, although the application's abstract is only one paragraph in length, it too manages to make reference to all [*22] four elements. See id at 32. Both the "Object of the Invention" section and the "Description of Prior Art" clearly discuss the importance of an editor and compiler. See id at 5. Indeed, even the application's background section and title suggest the importance of a compiler to the invention. See id at 1-2. In sum, multiple sections within Reiffin's 1982 application make clear that these four elements served integral functions in the overall invention.

After looking at the initial disclosure, the Gentry court also looked to the original claims contained in the application to see if those claims supported the conclusion that the omitted elements were essential. See *Gentry*, 134 F.3d at 1479. In the case at bar, as in Gentry, Reiffin's original claims do in fact support such a conclusion. Either directly or indirectly, each of Reiffin's 21 original claims references one, if not more, of the four elements. See McMahon Decl at Ex D, 23-31.

Finally, in addition to looking to the initial disclosure and the initial claims, the Gentry court also

reviewed evidence that the inventor of the Gentry sofa did not consider changing the location of the recliner controls until after he saw [*23] such an innovation in another product. The court therefore concluded that the inventor did not have an alternate location in mind when he made his initial disclosure. See *Gentry*, 134 F.3d at 1479. In the case at bar, although Reiffin's application strategically suggests that the described embodiment is only one preferred embodiment, Reiffin's repeated discussion of the four elements within this summary strongly suggests that he did not envision an application without these elements. See McMahon Decl at Ex D, 5-8. By itself, this evidence is not sufficient, but as in Gentry, this type of evidence serves to bolster the court's earlier conclusion that the application's disclosure did indeed reveal that the four elements were essential to Reiffin's invention.

It must be noted that Reiffin did not fully address the operative factual question whether these four elements were essential to his invention as originally disclosed. Instead, Reiffin focused his attack on Microsoft's legal arguments. Reiffin argued that Microsoft was urging an inappropriate application of Gentry. Indeed, even at oral argument, counsel for Reiffin sidestepped questions on this factual issue by commenting [*24] that there is no such thing as an essential element. As for written argument, it was not until Reiffin's untimely surreply that Reiffin actually argued that the omitted elements were not essential to his invention as originally disclosed. n4 This surreply is hardly convincing. Reiffin merely states in summary fashion that the compiler was not an essential element of his invention. See Sur Mem at 11. He provides little support for this proposition and does not even address the other three elements at issue.

n4 The court has already decided to consider this submission despite its untimely filing.

Reiffin has suggested that the four elements omitted from his currently asserted claims are not as essential to his invention as was the location of the controls on the console in the context the patented sofa in Gentry. Reiffin relies on the Gentry court's conclusion that the original disclosure of the sofa identified the console as the "only possible location" for the controls. See Opp Mem at 10 (quoting without [*25] citation *Gentry*, 134 F.3d at 1479). Looking at this phrase from the Gentry opinion in isolation, Reiffin's argument has some superficial appeal. Upon closer examination, however, it fails to pass muster.

There is nothing in the Gentry decision to suggest that the patent application in that case specifically stated

that the console was the only possible location for the controls. Instead, the Federal Circuit reached this conclusion because the "patent only describes sofas having controls on the console and an object of the invention is to provide a sectional sofa 'with a console *** that accommodates the controls for both reclining seats.'" *Gentry*, 134 F.3d at 1478. This is the same situation as the case at bar. Reiffin's 1982 patent application does not expressly say that the only possible embodiment of his invention involve the four elements. Nonetheless, the application's section describing the object of the invention makes clear an editor and compiler were essential to the invention. Other sections of the application similarly reveal the importance of all four elements.

In sum, the court finds that Microsoft has presented clear and convincing evidence that [*26] the four subsequently omitted elements were essential to Reiffin's invention as originally disclosed. The court will therefore grant Microsoft's motion for summary judgment and deny Reiffin's counter motion for summary judgment.

III

For the foregoing reasons, the court hereby

(1) DENIES Microsoft's motion (Doc # 50, Pt # 1) to strike or reschedule Reiffin's counter motion for summary judgment;

(2) GRANTS Microsoft's motion (Doc # 21, Pt # 1) for summary judgment; and

(3) DENIES Reiffin's counter motion (Doc # 31, Pt # 1) for summary judgment.

In light of this order, the court directs the clerk to terminate all pending motions, enter judgment for Microsoft and close the file.

IT IS SO ORDERED.

VAUGHN R. WALKER

United States District Judge

JUDGMENT. - ENTERED IN CIVIL DOCKET
JUL 14 1998

Fed. R. Civ. Pro. 58

In accordance with the court's order of July 10, 1998, Microsoft's motion to strike or reschedule Reiffin's counter motion for summary judgment is DENIED; Microsoft's motion for summary judgment is GRANTED; and Reiffin's counter motion for summary judgment is DENIED. Judgment is entered in favor of defendant and against plaintiff.

Dated: 7-10-98